

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Migration Regulations 1994

Migration (Critical Technology—Kinds of Technology) Specification (LIN 24/010) 2024

This legislative instrument is made by the Minister for Home Affairs under subregulation 1.15Q(2) of the *Migration Regulations 1994* (the Migration Regulations).

This instrument is made to specify the kinds of technology for the purposes of the definition of **critical technology** in regulation 1.03 of the Migration Regulations.

Overview – Promoting and protecting Australia’s critical technologies and research capabilities

The Australian Government is committed to maximising the opportunities offered by critical technologies, and supporting competitive, trusted, and diverse technology innovation and international markets, while minimising risks to our national interest.

Critical technologies are current and emerging technologies that have the capacity to significantly enhance or pose risk to our national interest. They are fundamental to Australia’s economic prosperity, social cohesion and national security, and are increasingly the focus of international geopolitical competition. Critical technologies can be digital (such as artificial intelligence) or non-digital (such as synthetic biology).

The safe and responsible development and application of critical technologies presents enormous opportunities for the Australian community and economy. Critical technologies will underpin exponential improvements in productivity, facilitating economic growth and high quality jobs, enabling all Australians to participate securely in the digital economy, improving our health, raising our living standards, and improving our defence and national security capabilities.

Critical technologies also confer a strategic edge, and at a time of intensifying geostrategic competition, this can be used to threaten our values, interests and way of life. This convergence of factors presents a spectrum of risks to Australia’s ability to realise the opportunities of secure, transparent critical technologies, including through: the malicious design, development and use of technology contrary to our values and institutions; impeding our ability to make sovereign decisions about the access, control and application of critical technologies; and interference in our domestic critical technologies ecosystem.

The Australian Government will work collaboratively with universities, research institutes and Australian industry to ensure we can balance the opportunities presented by critical technologies with appropriate risk mitigations. We are promoting innovation, science and research, and supporting competitive markets that rapidly and safely adopt new technologies and seize commercial opportunities.

It is vital to maintain the integrity of our research, science, ideas, information and capabilities to enable Australian industries to thrive and maximise Australia's domestic research capability and intellectual property.

In this context, the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* and the *Migration Amendment (Postgraduate Research in Critical Technology—Student Visa Conditions) Regulations 2022* (collectively, the PACT Regulations) amended the Migration Regulations to establish a legislative framework to manage the risk of unwanted transfer of critical technology in certain temporary and permanent visa programs. These amendments strengthened the Australian Government's ability to identify and manage risks associated with the unwanted transfer of critical technology, including intellectual property and property derived from critical technology.

The legislative framework establishes a mechanism for targeted pre-visa screening, through new public interest criterion 4003B. This is complemented by a new visa condition 8208 and a new cancellation power in paragraph 2.43(1)(c) of Part 2 of the Migration Regulations, which provides for appropriately targeted safeguards after the visa grant. These post-grant safeguards enable additional screening to occur where a student visa holder intends to undertake critical technology related study in the postgraduate research sector, and provides for the cancellation of certain visas in circumstances where the visa holder presents an unreasonable risk of unwanted transfer of critical technology.

Activating the framework

Although the amendments that established the critical technology screening framework commenced on 1 July 2022, the framework will not be activated until a legislative instrument is made to specify the kinds of technology it will cover.

This Instrument—made by the Minister under subregulation 1.15Q(2) of the Migration Regulations—is in effect the keystone of the new framework. If no technology is specified for the purposes of the definition of **critical technology** in regulation 1.03 of the Migration Regulations, the legislative framework to determine whether there is an unreasonable risk of **unwanted transfer of critical technology** (subregulation 1.15Q(1)), and the associated screening requirements in public interest criterion 4003B, condition 8208 and paragraph 2.43(1)(c), are not activated.

Purpose of this Instrument

The purpose of this Instrument is to specify the kinds of technology for the purposes of the definition of **critical technology** in regulation 1.03 of the Migration Regulations.

Regulation 1.03 provides that **critical technology** means:

- technology of a kind specified by the Minister in an instrument made under subregulation 1.15Q(2) of the Migration Regulations; or
- property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any technology specified by the Minister in an instrument made under subregulation 1.15Q(2) of the Migration Regulations.

Subregulation 1.15Q(2) of the Migration Regulations provides that the Minister may, by legislative instrument, specify the kinds of technology for the purposes of the definition of **critical technology** in regulation 1.03. The effect of specifying the kinds of technology in an instrument made under subregulation 1.15Q(2) is therefore that any such specified kind of technology is **critical technology** for the purposes of the Migration Regulations.

Significantly, the expression **critical technology** underpins the related expression **unwanted transfer of critical technology**, and other provisions inserted by the PACT Regulations that rely on the expression **critical technology**—including the public interest criterion 4003B in Schedule 4 to the Migration Regulations. The expression **unwanted transfer of critical technology** has the meaning given to it by subregulation 1.15Q(1) of the Migration Regulations. It means any direct or indirect transfer of **critical technology** by a person, or communication of information by a person about **critical technology**, that would:

- harm or prejudice the security or defence of Australia, including the operations, capabilities or technologies of, or methods or sources used by, domestic intelligence agencies (within the meaning of Part 5.6 of the *Criminal Code*) or foreign intelligence agencies (within the meaning of the *Criminal Code*); or
- harm or prejudice the health and safety of the Australian public or a section of the Australian public;
- interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or
- harm or prejudice Australia’s international relations:
 - in relation to information that was communicated in confidence by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; or
 - by enabling critical technology to be used in a way that is contrary to Australia’s international obligations or commitments; or
 - by leading to a reaction by a foreign country that damages Australia’s interests or relations with the foreign country or with a particular region.

Where a kind of technology is specified by the Minister under subregulation 1.15Q(2), it is therefore covered by the definition of **critical technology**, and is integral to understanding the meaning of **unwanted transfer of critical technology** provided by subregulation 1.15Q(1).

Commencement

The Instrument commences on 01 April 2024, or—if it is not made and registered before this day—the day after the Instrument is registered on the Federal Register of Legislation (FRL).

Consultation

Subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) requires that the rule-maker must be satisfied that there has been undertaken any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake.

The Department of Home Affairs consulted the Department of the Prime Minister and Cabinet, the Department of Industry, Science and Resources (including the Critical Technologies Hub), the Department of Education, the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Department of Foreign Affairs and Trade, the Department of Defence, and other relevant agencies. The Department of Home Affairs also consulted representatives of the higher education sector, including through the Universities Foreign Interference Taskforce (UFIT), and industry peak bodies through a series of roundtables and bilateral engagements. The outcomes of this consultation process informed the approach to finalising the list of technologies specified in LIN 24/010. Information in relation to the instrument and activation of the screening arrangements will be published on the Department’s website to inform and support visa holders, visa applicants and other stakeholders. The Department will also continue engaging closely with universities and other industry stakeholders and representatives.

The Office of Impact Analysis (OIA) was also consulted. The Instrument gives effect to provisions in the Migration Regulations inserted by the PACT Regulations, and is considered to have no more than minor regulatory impact. The OIA consultation reference number is OBPR22-02396.

Other matters

The Instrument is a legislative instrument within the meaning of section 8 of the *Legislation Act 2003* (the Legislation Act). The Instrument is made under subregulation 1.15Q(2) in Division 1.2 of Part 1 of the Migration Regulations. The *Migration Act 1958* (the Migration Act) and the Migration Regulations do not specify any conditions that need to be met before the power to make the Instrument is exercised.

The Instrument is exempt from disallowance under section 42 of the Legislation Act. This is because it is an instrument made under regulation 1.15Q in Division 1.2 of Part 1 of the Migration Regulations. An instrument made under Part 1 of the Migration Regulations is exempt from disallowance under paragraph (b) of item 20 of the table covered by section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. Section 10 provides that for the purposes of paragraph 44(2)(b) of the Legislation Act, the disallowance requirements of that Act do not apply to legislative instruments listed in the table covered by section 10.

Relevantly, the Explanatory Statement to the *Legislation (Exemptions and Other Matters) Regulation 2015* provides on page 31 of that Statement, that item 20 of the table “preserves the exemption that previously existed in item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. These instruments made under the Migration Act and Migration Regulations are appropriate for executive control.”

Subsection 504(2) of the Migration Act provides that section 14 of the Legislation Act does not prevent regulations whose operation depends on a country or other matter being specified by the Minister in an instrument in writing made under the regulations after the commencement of the regulations.

Details of the Instrument are set out in Attachment A.

Details of the Migration (Critical Technology — Kinds of Technology) Specification (LIN 24/010) 2024

Section 1 – Name

This section provides that the name of the instrument is the *Migration (Critical Technology—Kinds of Technology) Specification (LIN 24/010) 2024* (the Instrument).

Section 2 – Commencement

This section provides for the commencement of the Instrument.

The whole of the Instrument commences on the later of the following days:

- 1 April 2024; and
- the day after the Instrument is registered on the Federal Register of Legislation (FRL).

Section 3 – Authority

This section provides that the Instrument is made under subregulation 1.15Q(2) in Division 1.2 of Part 1 of the Migration Regulations.

Section 4 – Definitions

This section provides that the term **Regulations**, where it appears in this Instrument, means the *Migration Regulations 1994*.

Section 5 – Critical technology – specified kinds of technology

This section specifies seven kinds of technology for the purposes of the definition of **critical technology** in regulation 1.03 of the Migration Regulations. A kind of technology is specified where it appears in column 1 of an item in the table under section 5.

The following kinds of technology are specified in column 1:

- advanced manufacturing and materials technology;
- artificial intelligence technology;
- advanced information and communication technology;
- biotechnology;
- clean energy generation and storage technology;
- quantum technology;
- autonomous systems, robotics, positioning, timing, and sensing technology.

Column 2 of the table includes a description of each kind of technology specified in column 1. A note at the foot of the table clarifies that where a description is included in

column 2 in relation to an item in the table, that description is intended for information purposes only.

Section 6 – Application

This section provides for the application of the Instrument in relation to visas and visa applications.

Application of the Instrument in relation to visa applications

Subsection 6(1) provides that the Instrument applies in relation to any application for a visa made on or after the day this instrument commences. The definition of **critical technology** in regulation 1.03 underpins the meaning of **unwanted transfer of critical technology** provided by subregulation 1.15Q(1) for the purposes of PIC 4003B and the Migration Regulations more broadly.

Screening in relation to PIC 4003B—to determine whether there is an unreasonable risk of an unwanted transfer of critical technology by the applicant—will only apply to visa applications made on or after the day the Instrument commences. By providing that the Instrument only applies in relation to visa applications made on or after the day the Instrument commences, no kinds of technology would be specified for the purposes of this Instrument in relation to visa applications made before commencement. This ensures that where PIC 4003B is specified in the Schedule 2 criteria for a visa subclass, it will have no effect in relation to a visa application that was made before the Instrument commences.

For example, subclause 500.217(6) of Schedule 2 to the Migration Regulations provides that an applicant for a Subclass 500 (Student) visa must satisfy PIC 4003B if the applicant’s course of study or intended course of study is a postgraduate research course. If the visa application was made before the day on which the Instrument commences, the Instrument will not apply in relation to that visa application, and without any kind of technology being specified for the purposes of the regulation 1.03 definition of **critical technology**. PIC 4003B screening will therefore not be enlivened in relation to that visa application.

Application of the Instrument in relation to visa condition 8208 and related conduct

Subsection 6(2) provides that, where visa condition 8208 is imposed on a visa, the Instrument applies in relation to conduct covered by condition 8208 that first occurs on or after the day the Instrument commences. Visa condition 8208 relevantly provides, at subclause 8208(1), that the visa holder must not undertake **critical technology related study** unless:

- the Minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology by the holder; and
- the Minister has approved in writing the holder undertaking that critical technology related study.

Critical technology related study has the meaning given by subclause 8208(3), and means:

- a postgraduate research course within the meaning of clause 500.111 of Schedule 2 to the Migration Regulations that relates to **critical technology** (as defined in regulation 1.03); or

- a bridging course required as a prerequisite to a postgraduate research course that relates to critical technology; or
- a thesis or research topic that:
 - is for a postgraduate research course within the meaning of clause 500.111 of Schedule 2; and
 - relates to critical technology.

Visa condition 8208 was inserted in the Migration Regulations on 1 July 2022 and is a mandatory condition imposed on all Subclass 500 (Student) visas granted where the visa application was made on or after 1 July 2022. The application provision in subsection 6(2) of the Instrument ensures that where a visa is subject to condition 8208 and the visa holder has undertaken, or has begun to undertake, critical technology related study (conduct covered by condition 8208) *before* the day the Instrument commences, the Instrument does not apply.

The Instrument only applies in relation to condition 8208 where the visa holder first undertakes critical technology related study on or after the day the Instrument commences, and makes clear that the Instrument is not intended to have retrospective application in relation to conduct covered by condition 8208. For example, where a Subclass 500 (Student) visa holder whose visa is subject to condition 8208 changed their postgraduate research topic on 1 October 2023 to conduct research into quantum technology, the Instrument does not apply, and that conduct does not constitute a contravention of condition 8208. While the Instrument now specifies quantum technology as a kind of technology for the purposes of the regulation 1.03 definition of *critical technology*, at the time the visa holder first undertook that research, the Instrument did not apply.

Application of the Instrument in relation to regulation 2.43 and visas granted before, on or after the day the Instrument commences

Subsection 6(3) provides that for the purposes of regulation 2.43 of the Migration Regulations, and subitem 10802(2) of Schedule 13 to the Migration Regulations, the Instrument applies on or after the day on which it commences, in relation to any visa granted before, on or after the day on which the Instrument commences.

Subregulation 2.43(1) prescribes grounds for the purposes of paragraph 116(1)(g) of the Migration Act, which deals with circumstances in which the Minister may cancel a visa. Paragraph 2.43(1)(c) provides that, for the purposes of paragraph 116(1)(g), it is a prescribed ground that there is an unreasonable risk of an *unwanted transfer of critical technology* by the holder of the visa. The Instrument specifies kinds of technology for the purposes of the regulation 1.03 definition of critical technology, which includes where that term is relied on in subregulation 1.15Q(1) to provide the meaning of *unwanted transfer of critical technology*.

Alongside this, the application provision in subclause 10802(2) of Schedule 13 to the Migration Regulations provides, in relation to paragraph 2.43(1)(c) as inserted by the *Migration Amendment (Protecting Australia’s Critical Technology) Regulations 2022*, that paragraph 2.43(1)(c), and the other amendments made by Division 2 of Part 2 of Schedule 1 to the Regulations, apply in relation to any visa granted before, at or after the commencement of that Part.

Subsection 6(3) of the Instrument makes clear that, for regulation 2.43 purposes, the Instrument applies on or after the day it commences. This application provision is intended to make clear that the Instrument does not have retrospective application, but that it does apply in circumstances contemplated by subclause 10802(2) where, on or after the day the Instrument commences, consideration is being given to cancellation on the ground prescribed in paragraph 2.43(1)(c)—that is, where there is an unreasonable risk of an unwanted transfer of critical technology by the holder of the visa, regardless of when that visa was granted. The Instrument does not have retrospective application, in that it applies in relation to a prescribed ground at paragraph 2.43(1)(c) that provides that there is—at a time on or after the Instrument commences—an unreasonable risk of an ***unwanted transfer of critical technology*** (as defined by subregulation 1.15Q(2), which in turn relies on the definition of ***critical technology*** in regulation 1.03).